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APPELLEE'S BRIEF

3837

SUPREME COURT OF KENTUCKY

File No. 76-173

DWAYNE IRVIN TERRY and
DAVID WAYNE SHANKS

APPELLANTS

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES PARKS, JR., JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLEE

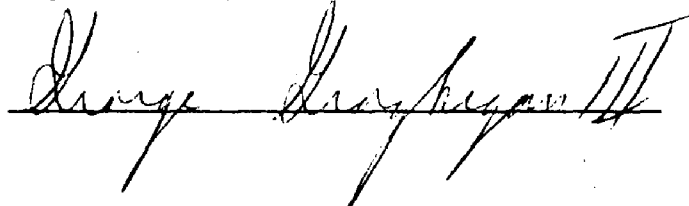
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CERTIFICATE OF SERVICE:

This is to certify that a copy of the within Brief for Appellee has been mailed, postage prepaid, to Hon. James Park, Judge, Fayette Circuit Court, Courthouse, Lexington, Kentucky 40507; Hon. William M. Radigan, Assistant Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601 and Hon. Patrick Molloy, Commonwealth Attorney, 22nd Judicial District, Lexington, Kentucky 40507 this 28th day of June, 1976.



FILED

JUN 28 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

SUPREME COURT OF KENTUCKY

File No. 76-173

DWAYNE IRVIN TERRY and
DAVID WAYNE SHANKS

APPELLANTS

VS. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES PARKS, JR., JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLEE

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTIONS PRESENTED

I.

DID THE APPELLANTS FAIL TO PRESERVE THE ERROR
PRESENTED FOR REVIEW ON APPEAL?

II.

WAS THE INSTRUCTION GIVEN BY THE TRIAL COURT DE-
FINING "REASONABLE DOUBT" CONSTITUTIONALLY INFIRM?

COUNTERSTATEMENT OF THE CASE

The appellee accepts the Statement of the Case set
forth in the appellants' brief as being substantially correct.
Any disagreements as to the facts will be set forth in the
arguments below.

ARGUMENT

I.

THE APPELLANT FAILED TO PRESERVE THE ERROR
PRESENTED FOR REVIEW ON APPEAL.

The Appellants herein claim that the instruction given
by the trial court defining "reasonable doubt" was Constitutionally

infirm, but the Appellants' trial counsel neither objected to the reasonable doubt instruction nor did he offer an alternative instruction thereon. Consequently, he has failed to preserve this argument for review on appeal. RCr 9.54 (2).

It is true that the Appellants allege a Constitutional error, but they do not make any claim that trial counsel was ineffective at the instruction stage of the trial.

II.

THE INSTRUCTION GIVEN BY THE TRIAL COURT DEFINING "REASONABLE DOUBT" WAS NOT CONSTITUTIONALLY INFIRM.

At the conclusion of the evidence, the trial court gave the following instruction as to "reasonable doubt":

"'Reasonable doubt' means a substantial doubt, a real doubt, in that you must ask yourselves not whether a better case might have been proved, but whether after hearing all the evidence you actually doubt that the defendant is guilty." Transcript of the Record, page 19.

The Appellants contend in their brief that the foregoing instruction given by the trial court denied the Appellants their Constitutional rights. In attempting to explain his position, counsel for the Appellants relies on In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), in which the Supreme Court of the United States recognized that the due process clause requires proof beyond a reasonable doubt in every criminal case. The Appellee, of course, agrees with this position but submits that the trial court has complied with this mandate.

In Merritt v. Commonwealth, 386 S.W.2d 727 (1965), this Court approved of the foregoing instruction which was given below. This instruction was reapproved in Whitaker v. Commonwealth, Ky.,

418 S.W.2d 750 (1967) and Carmen v. Commonwealth, Ky., 490 S.W.2d 744 (1973). The Appellants herein admit that this Court has approved the instruction given below but urge the Court to look at the instruction once again with a view to its Constitutionality.

The Appellants' claim seems to be that the instruction is Constitutionally infirm because it directs the jury to not consider lack of evidence. The Appellants cite People v. Davies, Mich., 190 N.W.2d 694 (1971) in which the Michigan Court of Appeals reversed a conviction for the reason that the trial court erroneously instructed the jury to not consider matters outside the evidence, lack of evidence or the unsatisfactory nature of the evidence. Although the instruction was held to be erroneous, the court did not rely on the due process clause of the United States Constitution in reaching its decision. The rationale was as follows:

"A reasonable doubt may arise 'from the lack, want or insufficiency of the evidence for the State,' and therefore, it was error to instruct the jury, as the judge did her, that a reasonable doubt may not be based on lack of evidence or the unsatisfactory nature of the evidence."
Davies, page 698.

In the case sub judice, the Appellants call this Court's attention to the following portion of the instruction given below:
". . . you must ask yourselves not whether a better case might have been proven. . . ." They claim that this portion of the instruction is similar to that defective portion of the instruction given by the trial court in Davies, and thus the instruction is infirm. We submit that this is hardly the case. This language instead focuses the jury's attention on additional evidence and, in fact, informs the jury

that there might have been more evidence than was presented, but goes further and says that the prosecution should not be required to cast away all doubt. This portion of the instruction does not direct the jurors to not consider the insufficiency of the evidence as did the instruction in Davies, supra.

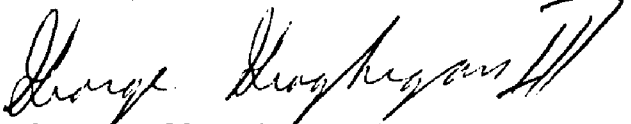
The instruction given below has been approved on many occasions by this Court. It does not violate the standard of due process set forth in Winship, supra. Therefore, the court below did not err in giving the foregoing instruction defining reasonable doubt to the jury.

CONCLUSION

For the foregoing reasons, the judgment of the Fayette Circuit Court should be affirmed.

Respectfully submitted,

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